

January 24, 2006

TO NEPA Task Force

FROM Ralph G. Swanson /s/ Ralph G. Swanson

SUBJECT Comments on Draft Report - Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act - Initial Findings and Recommendations, report dated December 21, 2005

I have been a resource professional in the Federal government for over 30 years, working with NEPA in three different Federal agencies. I have authored and reviewed many full EISs, Environmental Assessments, and Categorical Exclusions. I have worked with other Federal and State agencies and private entities on NEPA compliance and I am intimately familiar with the various problems studied by your task force.

The draft report is thorough and correctly identifies many relevant and important problems and limitations in the NEPA process. NEPA professionals, such as myself, are acutely aware of these issues and would welcome modifications in several areas you have considered. However, I believe a number of draft recommendations are infeasible and should be abandoned or revised. Thank you for the opportunity to offer my comments on these recommendations:

1.1 Amend NEPA to define "major federal action."

To redefine this term to include only "new and continuing projects that would require substantial planning, time, resources, or expenditures" substitutes one vague definition for another: what is "new", "continuing" and "substantial"? CEQ already characterizes a major federal action as one "significantly affecting the quality of the human environment." Thus, NEPA is already limited to those projects with significant environmental impacts. This is the proper qualification on this definition, but one all too often overlooked by action agencies. No efficiencies will derive from revising a definition that agencies and NEPA professionals are comfortable with after 35 years of application.

I have long believed that action agencies make insufficient use of the Environmental Assessment (EA) provisions of NEPA to analyze whether impacts are truly significant. An EA need be only a cursory review of impact issues to assess whether they are significant. An EA is not a "short form" EIS. It need not analyze the impact in any greater detail than needed to determine whether the impact is significant (using a test of significance determined by the agency). Thus, federal actions, even major ones, having no significant impacts do not need a full EIS.

Nevertheless, agencies often do not want to spend the added resources on the EA, believing a full EIS will be required anyway. I do not believe this is a valid objection. If action agencies would prepare, and circulate for public and agency review, an EA that is critically prepared and well substantiated, many actions that do not significantly impact the environment could proceed without delay.

Direction to the agencies to make greater use of the EA is likely to reduce NEPA burdens far

more than any attempt at limiting the definition of “major federal action.”

#### 1.2 Amend NEPA to add mandatory time lines for the completion of NEPA documents.

I believe this recommendation is unworkable. In my experience, delays are due to inaction or nonperformance on the part of applicants or other partner agencies, internal agency “politics”, delays in interrelated projects or decisions, or other valid administrative obstacles. CEQ should simply not become involved in such matters. Moreover, without penalties, any such deadlines would be meaningless.

#### 2.1 Direct CEQ to prepare regulations giving weight to localized comments.

This recommendation is not in the spirit of NEPA and probably violates other Federal laws and regulations. Public comments on a NEPA document must be evaluated on their merit, not their source. Local interests do not inherently have more knowledge, concern or interest in a given action and are not entitled to special deference.

#### 2.2 Amend NEPA to codify the EIS page limits.

This is cosmetic at best and would not be observed by the agencies in practice. Some projects such as large water resource projects, large mining, highway or military projects simply cannot be adequately covered in 300 pages. Such a recommendation will encourage “piece-mealing” (considering only segments of a project to minimize impacts) of NEPA analyses, which is already a significant problem.

Moreover, CEQ guidelines already allow lead agencies to set page limits (1501.7(b)(1)). It clearly has not worked to date.

#### 5.1 Amend NEPA to require that “reasonable alternatives” be limited to those which are economically and technically feasible.

If this means the burden of conducting feasibility and engineering studies on alternatives rests with the entity suggesting the alternative, this recommendation is unworkable and should be rejected.

If not, the recommendation is unnecessary. Under current NEPA, the action agency has complete latitude in determining the proposed action and the reasonable alternatives. In my experience, agencies legitimately reject alternatives based on their own assessment of economic and technical feasibility. If that assessment is supported by facts and rational analysis I have rarely seen it contested. Of course, any such decision is subject to judicial review, but your report already presents the statistics that show little risk of reversals by the courts.

#### 7.2 Direct CEQ to control NEPA related costs.

This recommendation is unnecessary and the cost issue is not an appropriate one for CEQ. Your task force has not disputed the testimony that NEPA costs are balanced by improved

environmental decisions. Cost guidelines for adequate NEPA would never be realistic given the wide scope and potential range of impacts for federal actions.

#### 8.1 Clarify the meaning of “cumulative impacts.”

Most NEPA professionals, and action agencies, would welcome improved CEQ guidance on cumulative effects. It is one of the most difficult impact issues to assess and critique. Unfortunately, the task force’s suggested provisions do not help to clarify matters. To allow an agency to apply its own assessment methodology renders a cumulative effects analysis meaningless. Your task force should recommend that CEQ develop more detailed guidance on this matter to bring more rigor and consistency to agency analysis and NEPA documents. This comment is applicable to 8.2 as well.

It is not clear that your task force considered the utility and application of the Categorical Exclusion provisions of NEPA. As with the EA, I believe reasonable expansion of guidelines for the Categorical Exclusion would reduce the burden, costs and time delays associated with NEPA. In my experience, exclusion categories are unduly restricted to administrative, personnel, and financial functions and do not assist agencies in reducing their NEPA workload.

Many agency actions individually and collectively have no significant impact on the environment. Agencies should be directed/encouraged to develop exclusion categories for such actions as repair or replacement of existing facilities when no change in scope, operations or effects are proposed; actions that reduce or correct existing environmental impacts; and, possibly, actions solely designed to improve existing environmental conditions. The Army Corps of Engineers has simplified its Clean Water Act Section 404 (wetlands) permitting with expedited approvals for actions that create or enhance wetlands. NEPA regulations could be similarly relaxed.

To be sure, such categories may be few in number, difficult to define, and agencies may attempt to abuse the provision. Nevertheless, give the agencies the chance to develop these categories with oversight and final approval by CEQ. Direct CEQ to develop standardized language for such categories and publish the results in the Federal Register for public review. This is an area where CEQ leadership and guidance is needed, more so than in policing NEPA deadlines and tracking NEPA costs.

Thank you for the opportunity to comment.

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